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No. 83-1870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

THE NEW REGINA CORPORATION and
GREY ADVERTISING INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in exercising its discretion to decide that a preliminary injunction was inappropriate, the United States Court of Appeals for the Second Circuit correctly applied copyright law principles to the facts of this case to determine that petitioner was unlikely to succeed on the merits?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents The New Regina Corporation ("Regina")[1] and Grey Advertising Inc. respectfully request that this Court deny the petition for certiorari filed May 14, 1984

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[1] This litigation involves television advertisements regarding Regina vacuum cleaner products. When the case was initiated, they were manufactured by The Regina Company, then a division of a wholly-owned subsidiary of General Signal Corporation, a defendant below. On July 3, 1984, General Signal divested Regina, and The New Regina Corporation was formed. After consultation with the Clerk's Office, we have captioned this Brief in the name of the new entity, now the real party in interest.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondents The New Regina Corporation and Grey Advertising Inc. state that each has no corporate parent and no publicly-owned subsidiaries or affiliates.

seeking plenary review of an interlocutory decision by the United States Court of Appeals for the Second Circuit that reversed and vacated a preliminary injunction barring broadcast by respondents of two television commercials.[2]

In September, 1983, Regina began a national television advertising campaign for The Regina Electrikbroom Powerteam vacuum cleaner ("The Regina Powerteam") that contained brief, verbatim quotations from an article that evaluated lightweight vacuum cleaners in *Consumer Reports*, published by petitioner Consumers Union of United States ("CU"). On September 30, 1983, CU filed the instant action. The Complaint alleged violations of the copyright laws, 17 U.S.C. § 1 *et seq.*, of the Lanham Act, 15 U.S.C. § 1114(1) and 1125(a); and of state and common law. On October 13, 1983, upon the basis of a record consisting exclusively of written briefs and affidavits, the district court entered a preliminary injunction based solely on the copyright claim.

Regina took an expedited appeal to the Second Circuit. On November 25, 1983, a unanimous panel of the Court of Appeals reversed the District Court and vacated the injunction. The Court issued its opinion in support of its judgment on December 6, 1983. The court found that no preliminary injunction was appropriate because CU failed to establish a likelihood of success on the merits on any ground asserted in its complaint or to introduce concrete evidence of harm to CU, while there was "substantial evidence of potential harm to Regina from maintenance of the injunction." (Pet. App. 24a).

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[2] The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari, "Pet. App." for citation to the Appendix to the Petition and "App." for citation to the Joint Appendix below.

STATEMENT OF FACTS

Regina's principal business is the manufacture of lightweight, upright vacuum cleaners. These are lighter, smaller, and cheaper than conventional full-sized vacuum cleaners. Regina's top of the line model is The Regina Powerteam.[3]

Petitioner CU is a non-profit, independent consumer organization that compiles and provides information to the public regarding consumer products and services. CU maintains testing laboratories and facilities, conducts tests, and makes judgments on purchased samples of tested products and services. The results of CU's tests are published in its monthly magazine, *Consumer Reports*, distributed to paid subscribers and sold on newsstands.[4]

In its July 1983 issue, *Consumer Reports* evaluated lightweight vacuum cleaners. The headline of the article declared "Most of the 18 we tested were lightweight performers. Only one worked well." The one product that *Consumer Reports* singled out was The Regina Powerteam. The article was illustrated with a picture of a man holding The Regina Powerteam, captioned "Regina Powerteam—far ahead of the pack in cleaning ability." The *Consumer Reports* article was remarkable in the clearcut, decisive edge it gave The Regina Powerteam over the other seventeen models tested:

> —"Of the models we tested, only the *Regina Power Team* has a motorized nozzle brush, like that in a full-sized vacuum cleaner."
>
> —"[O]nly one model, the check-rated *Regina Power Team*, was an adequate substitute for a full-sized vacuum."
>
> —"Only the *Regina Power Team* vacuumed the floor thoroughly."

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[3] App. 129-130.

[4] App. 84-85.

—"The *Regina Power Team* also stood out in our carpet-cleaning test. It alone left the carpet presentable after only one sweep, pristine after two sweeps."

—"Since the *Regina Power Team* was the only lightweight with a powered nozzle brush, it was the only model tested for deep carpet cleaning. Our experience showed that the others, using suction alone, couldn't handle the job. The *Power Team's* deep-cleaning performance was comparable to that of a fair, full-sized canister vacuum with a power nozzle."

—The article concluded: "The check-rate *Regina Power Team*, with its power nozzle, performed much like a full-sized vacuum cleaner. It was the only model judged very good at picking up sand and dust from bare floors. It was the only model that did a very good job of cleaning our medium-pile carpet. And it did the job with the least effort."[5]

CU also disseminated the results of its evaluation of lightweight vacuum cleaners well beyond the pages of its magazine. *Consumer Reports* distributes news reports encapsulating its test reports to newspapers nationwide. In late July, 1983, *Consumer Reports* issued such an article on the lightweight vacuum cleaners, distributed to between 300 and 400 papers. The newspaper account parallels in briefer form the magazine article.[6]

Because of the highly competitive nature of the market for lightweight vacuum cleaners, most manufacturers,

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[5] Pet. App. at 63a-74a. The article contained a chart summarizing the evaluations of the products tested. The Regina Powerteam was listed at the top of the chart, accompanied by a check mark. Models are check-rated when Consumers Union judges the samples of the products tested to be of high overall quality and appreciably superior to non-check-rated models in the same report.

[6] App. 145-150. Additionally, CU aired an even briefer radio "Report to Consumers" on July 26, 1983 trumpeting The Regina Powerteam. App. 151-152.

including Regina, advertise their product directly to the consumer. Sales of lightweight vacuum cleaners are cyclical, with more sold in the second half of the year (particularly during the Christmas season) than the first six months. Consumer marketing is therefore geared to this second six-month period, especially the fourth calendar quarter.[7]

As a part of its product promotion, Regina planned a national television advertising campaign for 1983. Regina's research has indicated that there is a strong correlation between advertising its products and increases in the sales of its products. Regina coordinated its national advertising with its promotional activities among retail sales outlets in an attempt to maximize shelf space, exposure and selling conditions for its products. The advertising campaign was designed to lead up to the Christmas selling season.[8]

In connection with its national advertising campaign, Regina purchased time spots on the American Broadcasting Company, the National Broadcasting Company, and CBS, Inc. networks, starting September 26, 1983. Programs and time slots were selected on the basis of demographic research to aim the messages most efficiently and most economically at the target audience of potential lightweight vacuum cleaner purchasers. Because of practices in the television industry, Regina purchased its time spots several months in advance.[9]

Regina prepared three commercial messages for this television campaign. The first, not at issue in this litigation, emphasized the lightweight nature of The Regina Powerteam by showing several women handling the product as if it were a military rifle.

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[7] App. 133-34.

[8] App. 134.

[9] *Id.*

The second message, entitled "Squid", also emphasizes the lightweight convenience of The Regina Powerteam, compared to full-sized vacuum cleaners. It then reinforces the message by reassuring the potential customer that the product can be used like a full-sized vacuum cleaner. During one of the many different visual portions of the message the voice-over announcer quotes, accurately, that The Regina Powerteam "is the only lightweight that *Consumer Reports* says was an adequate substitute for a full-sized vacuum." Superimposed on the screen the entire time *Consumer Reports* is mentioned, is the statement that "*Consumer Reports* is not affiliated with Regina and does not endorse Regina products or any other products." [10]

In the third message, entitled "Consumer Reports," Regina provides the consumer with more complete information regarding the *Consumer Reports*' glowing evaluation of its product. The message includes several quotations from the *Consumer Reports*' evaluation visually displayed on the screen as they are read by the announcer. Each time that *Consumer Reports* is mentioned and a quotation is read, there appears on the screen the statement that "*Consumer Reports* is not affiliated with Regina and does not endorse Regina products or any other products." This statement appears on screen for a total of 14 seconds out of the 29.5 second actual duration of the message.[11]

In preparing its message, Regina took great pains to insure that its messages were accurate, fully comported with applicable law, and did not suggest that CU endorsed or sponsored the product or the messages or otherwise associated it with Regina rather than with the information in its magazine. As a consequence, Regina took the extraordinary step of including in its messages

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[10] Pet. App. 6a-7a; 77a-79a.

[11] Pet. App. 7a; 77a-79a.

the visual statement that emphasizes the independence of *Consumer Reports* from Regina and the fact that *Consumer Reports* does not endorse products.[12]

Regina notified CU that it planned to broadcast these commercials. CU ultimately filed suit and sought a preliminary injunction, representing a prior restraint against the airing of the commercial messages. At the approximately one-half hour hearing on its injunction request in the district court, CU presented no live testimony, but offered only the argument of its counsel and a conclusionary affidavit by its Executive Director. While CU contended that it would be irreparably harmed by these messages, its only evidentiary assertion was a single written paragraph:

> "Each broadcast [of the Regina message] hurts Consumers Union deeply. Each broadcast destroys more and more of the untainted reputation for impartiality and freedom from the commercial bias which we have painstakingly spent forty-seven years in acquiring.[13]

In opposition to CU's request for an injunction, Regina submitted the affidavit of its President that set forth the circumstances leading to the development of the Regina advertising campaign. The affidavit also documented the irreparable harm Regina would suffer by an injunction preventing it from communicating with the public:

> The entry of an injunction would irreparably disrupt Regina's business plans and operation. It is uncontroverted that Regina is in a highly competitive market, with low brand identification, a modest

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[12] Moreover, Regina presented the message on the screen in a size that is comparable with normal television advertising practice for required disclosures, used by major companies such as General Motors or Ford. In addition, the statements remain on the screen for a considerably longer period than is normally utilized for such disclosures. App. 136.

[13] Pet. App. 23a; App. 98.

market share, and the challenge of new entry. Regina has made a substantial commitment of resources to purchase national advertising time on the three networks and has coordinated its entire marketing programs with this national advertising.

An injunction would play havoc with Regina's marketing strategy. Retail dealers and the trade have been informed of the marketing support represented by Regina's national advertising campaign. Inventories and shelf space commitments exist reflecting Regina's marketing commitments. It is impossible to quantify the loss in dollars for the hoped for success of the campaign cannot be predicted. Enjoining Regina from presenting its messages at the times it selected would be especially harmful since it would deprive Regina of its audience just at the time of the year when sales of vacuum cleaners peak. Regina will be irreparably injured not only by the loss of sales and audiences, but by the harm that will be caused to existing relationships with the trade and its dealers.[14]

Since the Second Circuit vacated the district court's injunction, Regina has broadcast the "Squid" and "Consumer Reports" messages on the three national television networks between December, 1983 and May, 1984.

SUMMARY OF ARGUMENT

CU asks this Court to undertake its own plenary review of the Second Circuit's judgment of CU's likelihood of success on the merits of its copyright claim and thereby have this Court conduct its own "full review" of whether a preliminary injunction is appropriate. This Court's review of that component of the decision below is unwarranted, not only because the decision is interlocutory, but because that decision rests on the Second Circuit's discretionary factual determination that

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[14] App. 139-140.

the balance of equities favored Regina, not CU. Thus, the review requested by CU would not change the result below.

Nor does anything in the Second Circuit's discussion of the copyright fair use doctrine warrant review. The Second Circuit's decision is in conflict with no decision of this Court or any court of appeals, but like previous decisions of that and other circuits, balanced both the factors enumerated by Congress as relevant to fair use and the evidence of harm on the record, and made a determination on the facts of this case. CU's efforts to manufacture a conflict between the Second Circuit decision and this Court's subsequent opinion in *Sony Corporation of America v. Universal City Studio, Inc.*, 104 S.Ct. 774 (1984) does not withstand scrutiny of the court of appeals' opinion.

ARGUMENT

I. SINCE THE DECISION OF THE COURT OF APPEALS INVOLVED A PRELIMINARY INJUNCTION, IT IS NONFINAL AND NOT RIPE FOR REVIEW BY THIS COURT AND ALSO RESTS INDEPENDENTLY ON FACTUAL DETERMINATIONS NOT BEFORE THIS COURT

This Court traditionally has refused to review interlocutory judgments of federal courts.[15] The prohibition, although not jurisdictional, conserves limited judicial resources and avoids piecemeal litigation. Interlocutory

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[15] *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of finality "of itself alone furnished sufficient ground for the denial"); R. Stern & E. Gressman, SUPREME COURT PRACTICE § 4.19 (5th ed. 1978).

review has been held proper only in limited circumstances involving exceptional facts.[16]

CU has made no showing that this is such a case.[17] To the contrary, even if CU could demonstrate that its view on fair use were correct, that would not change the result below. The court of appeals explicitly found that "CU has not sustained its burden of showing that the equities lie in its favor." (Pet. 23a.) While acknowledging CU's reputation, the Court held that "Regina's use of an explicit disclaimer makes CU's conclusory claims of harm unacceptable." (Pet. 24a.) On the other side of the balance, the court found "substantial evidence of potential harm to Regina from maintenance" of an injunction. (*Id.*) CU has not challenged these findings. Hence, the decision below is correct for reasons independent of the likelihood of success on the merits challenged in the petition.

II. THE DECISION BELOW IS COMPLETELY CONSISTENT WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS

A. CU's first argument for review, that the Court of Appeals misapplied the commercial free speech doctrine (Pet. 18-32), is a strawman. Nothing in the opinion

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[16] *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *American Construction Co. v. Jacksonville T. & K. W. Ry.*, 148 U.S. 372, 384 (1893).

[17] The writ of certiorari to the United States Court of Appeals for the Second Circuit in *Harper & Row Publishers, Inc. v. Nation Enterprises*, No. 83-1632, raises issues of fair use very different from those in this case. In any event there is no reason to hold this petition pending a decision in *Harper & Row*, since this case will be returned to the district court in any circumstance for trial on the merits, and the courts below will have the benefit of any relevant holdings in *Harper & Row* in subsequent proceedings.

below supports CU's apocalyptic suggestion that the Second Circuit carved out a new commercial speech fair use exception that rides roughshod over all copyright rights, or that its holding is "inconsistent with this Court's numerous decisions in the commercial speech area." (Pet. 20).

The court simply made the required factual analysis of the four factors delineated in the statutory definition of fair use, 17 U.S.C. § 107. In considering the "purpose and character of the use," 17 U.S.C. § 107(1), the Second Circuit rejected CU's argument that a commercial use can never be a fair use. CU would now have this Court construe that rejection as a holding that puts a commercial use on a higher footing than other uses. The court of appeals' ruling, however, was simply that commercial use "alone does not defeat a fair use defense," (Pet. App. 11a), and that—in this instance—the use does "more than propose a commercial transaction," [18] it "includes the conveyance to consumers of useful information which is protected by the First Amendment." (Pet. App. 11a). Moreover, the court contrasted such conveyance of information with appropriation of the form of expression. (Pet. App. 12a). The court's conclusion in this regard is firmly grounded upon this Court's recognition of the public interest in commercial speech:

> [A]dvertising . . . is dissemination of information as to who is producing and selling what product, for what reason and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those

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[18] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976), *quoting Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973).

> decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of information is indispensable.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

The Second Circuit's holding that commercial advertising can be a fair use accords with the only other circuit decision involving advertising, *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).[19] It also accords with the many other decisions holding that a use is not disqualified as a fair use merely because it has a commercial motive.[20]

Hence, the Second Circuit's decision represents no startling departure from the commercial speech doctrine or court of appeals precedent on fair use in a commer-

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[19] In *Triangle*, the court of appeals held that the fair use doctrine permitted a newspaper's comparative advertisements promoting its television program guide publication to display copyrighted covers of a competing publication, *TV Guide*. The *Triangle* court took account of Congress' emphasis that "the doctrine of fair use must be flexible." 626 F.2d at 1176 n.13, *citing*, H.R. No. 94-1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News, p. 5659, Sen. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975). It found that the fact that "the commercial use occurred in the course of a truthful comparative advertisement undercuts the significance of the commercial nature of the use." *Id.* Regina's messages too are in the nature of comparative advertising, merely substituting for the advertiser's own unavoidably self-serving claims more reliable references to a third party's findings.

[20] *See Elsemere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1969); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F.Supp. 217 (D.N.J. 1977); *Karll v. Curtis Publishing Co.*, 39 F.Supp. 836 (E.D. Wisc. 1941).

cial context.[21] It is merely the effectuation of Congress' direction to consider "the purpose and character of the use." It is likewise consistent with the purposes for which Congress recognized fair use. Indeed, in that context, CU's reliance on Professor Nimmer to attack the Second Circuit's decision is puzzling (Pet. 26), since Professor Nimmer submitted an affidavit in the district court in support of Regina, which indicated, *inter alia*, advertising of an informational nature may be a fair use notwithstanding its commercial nature and that

> "The Regina messages precisely constitute such an informational use in that they provide information to the public as to the objective evaluation of a product by a third party, and hence provide poten-

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[21] The court's holding is not "directly contrary" (Pet. 26) to the Second Circuit's previous decision in *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980). There is no resemblance between the two cases. At issue in *Iowa State* was a 28-minute student film regarding an Olympic wrestling champion at the school. Plaintiff sought to sell the film to ABC for use during its Olympics broadcast coverage; no agreement was ever consummated, but ABC ultimately used substantial parts of the film. The Second Circuit found that the fair use doctrine was inapplicable, principally because ABC's use "did foreclose a significant potential market to Iowa—sales of its film for use on television in connection with the Olympics." *Id.* at 62.

In rejecting ABC's argument that its use was worthy of protection under the first fair use standard because it assisted the development of historical and biographical works, the court of appeals made the dictum quoted by CU (Pet. 27) out-of-context that the "fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Id.* at 61. In the context of the *Iowa State* facts, the statement makes perfect sense. As it is being applied here, CU equates the absence of CU's consent, *ipso facto*, with corporate theft by Regina. But that equation totally miscomprehends the fair use doctrine which *by definition* is use of copyrighted material *without the consent of the copyright owner*. *E.g.*, *Rosemont Enterprises*, *supra*, 366 F.2d at 306.

> tial buying information. Moreover, § 107 expressly provides that "criticism" and "comment" are primary forms of use envisaged under the fair use doctrine. The repetition of such criticism or comment, within reasonable limits, in my opinion likewise constitutes a use envisaged by the fair use doctrine. For example, it would be unthinkable for the publisher of a book or the producer of a Broadway play to have to obtain a license from the *New York Times* before there could be a quotation of comments from a favorable review appearing in the *Times*." [22]

B. CU's attempt (Pet. 32-46) to concoct a conflict between the decision below and this Court's recent decision in *Sony Corp. v. Universal City Studios*, 104 S.Ct. 774 (1984) is equally extravagant. CU's selective excerpting from the *Sony* opinion regarding commercial use (Pet. 33) and harm to the copyright owner (Pet. 35-36) ignores that in this case, unlike, for example, in *Sony*, the copy does not compete with and cannot substitute for the copyrighted works. Regina is not selling or promoting its advertisements. Thus, the court of appeals found that "we [are] faced with a claim of injury which does not stem from competition between the copyright owner and the copier. . . ." (Pet. App. 16a).[23]

In *Sony*, on the other hand, in language seized upon by CU, this Court contrasted "commercial use" with the "*monopoly privilege* that belongs to the owner of a copyright." 104 S.Ct. at 793 (emphasis added). Thus, it is evident it looks on commercial use as unfair because it competes against the copyright holder. The Second Cir-

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[22] App. 161.

[23] As Professor Nimmer recognized (App. 163), CU's arguments suggest that the prevailing custom of excerpting theatre, movie, and restaurant reviews from major publications replaces the demand for the copyrighted original and is an infringement, an erroneous result that runs counter to the basic purpose of copyright.

cuit was entirely consistent with *Sony*, therefore, when it looked on the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyright work," [24] as "aimed at the copier who attempts to usurp the demand for the original work." [25]

Despite the fact that there have been previous instances where advertising uses of *Consumer Reports'* evaluations had not been enjoined,[26] CU placed in the record no concrete evidence of actual or future harm to the demand for its works, let alone evidence amounting to a preponderance of the evidence. In such consequences, the Second Circuit's rejection of a conclusory assertion of harm in an affidavit (App. 98) is unremarkable and requires no review by this Court.[27]

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[24] 17 U.S.C. § 107(4).

[25] Pet. App. at 14a-15a (citations omitted).

[26] *Consumers Union of United States v. Theodore Hamm Brewing Co., Inc.*, 314 F.Supp. 697 (D. Conn. 1970); *Consumers Union of United States, Inc. v. Hobart Manufacturing Co.*, 189 F.Supp. 275 (S.D.N.Y. 1960).

[27] CU's attempts to ascribe an evidentiary standard to the Second Circuit's evaluation of the absence of evidence of harm reads too much into what is in the context of the evidence an inconsequential choice of words.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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